Filed 10/5/10 P. v. Collom CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DAVID PAUL COLLOM, Defendant and Appellant.	C062499 (Super. Ct. No. SF110831A)

A jury found defendant David Paul Collom guilty of inflicting corporal injury on his wife, felony false imprisonment, and grossly negligent discharge of a firearm, and found that in committing the first two crimes he personally inflicted great bodily injury under circumstances involving domestic violence. The trial court sentenced him to an aggregate term of five years in prison.

On appeal, defendant contends the trial court erred in instructing the jury on felony false imprisonment and the great bodily injury enhancements and he received ineffective assistance of counsel with respect to both of those

instructional issues. He also contends there was insufficient evidence he inflicted great bodily injury on the victim during the commission of the false imprisonment, the admission of prior acts of domestic violence violated his constitutional rights to due process, fines and fees not orally pronounced but found in the court minutes and the abstract of judgment must be stricken, and imposition of the court facilities assessment under Government Code section 70373 on the charge of grossly negligent discharge of a firearm violated the ex post facto clauses of the state and federal Constitutions.

We conclude the trial court prejudicially erred when it failed to instruct the jury properly on the elements of felony false imprisonment, and there was insufficient evidence to support the great bodily injury enhancement on the false imprisonment charge. We also conclude the trial court did not properly pronounce all of the applicable fines and fees. Beyond that, we either reject, or need not reach, defendant's remaining arguments. Accordingly, we will affirm the convictions for inflicting corporal injury and grossly negligent discharge of a firearm, but will otherwise reverse the judgment and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of trial in June 2009, defendant and the victim had been married for eight years. In December 2008, they were living in Stockton. Sometime around Christmas, defendant fired numerous gun shots inside their house.

About a month later, on January 25, 2009, the victim got a ride back to the house from another man after she could not start her car. The victim entered the house while defendant asked her who the man was. She answered and continued to walk past defendant, when he asked her why she had not told him she was leaving. The victim put her hand up, told defendant she had to go to the bathroom, and continued walking through the living room and into the kitchen.

In the kitchen, defendant managed to get in front of the victim and struck her in the face with his fist, breaking her nose and her cheekbone and knocking her to the floor. Defendant continued punching her while she was down, and when she hit back, defendant began striking her harder and placed his knee on her cheek, pushing her face into the floor.

Somehow the victim managed to get up, and defendant backed off. When she started to run toward the kitchen door, he reached it first and appeared to lock it. She then moved toward the front door, but he again got in front of her and ran to that door, where he checked the locks. The victim saw her brother passing by outside the kitchen window, and as defendant was coming back from the front door, she went to the window and opened it, telling defendant she needed to breathe. She then told her brother to help her and started to reach out of the window. Her brother grabbed her arms to pull her out, but defendant grabbed her legs, and the two men tugged and pulled on her. After about a minute or so, her brother prevailed and pulled her outside, where she ran to a neighbor's house.

Defendant was charged with grossly negligent discharge of a firearm for the incident in December 2008 and with inflicting corporal injury on a spouse and felony false imprisonment for the incident in January 2009. Each of the latter two charges included an enhancement allegation under Penal Code[1] section 12022.7, subdivision (e), alleging that in committing the crime defendant personally inflicted great bodily injury under circumstances involving domestic violence.

Before trial, the prosecution moved to introduce evidence under Evidence Code section 1109 of prior conduct by defendant involving domestic violence. The trial court ruled that "anything involving the actual victim in the case" was admissible because "the probative value outweighs the prejudicial [effect] as to . . . alleged acts against [the victim] by the defendant."

With respect to the felony false imprisonment charge, the trial court instructed the jury that defendant was "charged . . . with false imprisonment by . . . violence or menace in violation of Penal Code Section 237(a)" and then instructed the jury on the elements of that crime as follows: "To prove . . . that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant intentionally restrained, confined, or detained someone; [¶] And, two, the defendant made the other person stay or go somewhere against the person's

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[1] All further section references are to the Penal Code unless otherwise noted.

will. [¶] Violence means using physical force that is greater than the force reasonably necessary to . . . restrain someone. [¶] Menace means a verbal or physical threat of harm. The threat of harm may be expressed or implied." Missing from the instruction was the phrase "by violence or menace" after the words "restrained, confined, or detained someone."[2]

With respect to the great bodily injury enhancement allegations, the trial court instructed the jury as follows: "[I]f you find the defendant guilty of the crimes charged in Counts 1 and 2, you must then decide whether for each crime the People have proved the additional allegation that the defendant inflicted great bodily injury on [the victim] during the commission of that crime, under circumstances involving domestic violence." Although the court had just told the jury that "[t]he term great bodily injury is defined elsewhere in these instructions," the court never actually defined that term for the jury, as the instructions ended just moments later.[3]

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[2] Examination of the marked-up copy of CALCRIM No. 1240 -- the felony false imprisonment instruction -- in the clerk's transcript reveals that the phrase "by violence or menace" was lined out along with the optional (i.e., bracketed) phrase that precedes it in the form instruction ("[or caused that person to be (restrained[,]/ [or] confined[,]/ [or] detained)]").

[3] Examination of the marked-up copy of CALCRIM No. 3163 -- the great bodily injury instruction -- in the clerk's transcript reveals that the definition of "great bodily injury" was lined out along with other language in the instruction the court apparently determined was inapplicable or unnecessary.

The jury found defendant guilty of all three charges and found both great bodily injury enhancement allegations true.

In a sentencing brief, the People argued defendant "should be punished separately f[or] the beating in the kitchen and preventing the victim from escaping because they were separate acts with separate objectives." At the sentencing hearing, defense counsel argued the two offenses were part of "one continuous event."

The trial court sentenced defendant to an aggregate term of five years on the inflicting corporal injury charge -- the lower term on the charge plus a consecutive lower term for the great bodily injury enhancement.[4] The court stayed punishment on the false imprisonment charge and its great bodily injury enhancement as "precluded by [Penal Code section] 654" (without first imposing any such punishment).[5] For the grossly negligent

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[4] The reporter's transcript shows that the trial court imposed "the lower term of three years" for the inflicting corporal injury charge and a consecutive "lower term" for the great bodily injury enhancement, "for the term of five years in state prison." The problem with this is that the lower term for inflicting corporal injury is two years, not three (§ 273.5, subd. (a)), while the lower term for the great bodily injury enhancement is three years, not two (§ 12022.7, subd. (e)). However, the minute order from the sentencing hearing, the state prison commitment form, and the abstract of judgment all correctly reflect a two-year term for the inflicting corporal injury offense and a three-year term for the great bodily injury enhancement. Accordingly, we conclude the reporter's transcript is incorrect and the trial court correctly sentenced defendant to the lower terms on both the offense and the enhancement.

[5] The correct procedure is "to sentence defendant for each count and stay execution of sentence on [those] convictions to

discharge of a firearm, the court sentenced defendant to two years but ordered that sentence run concurrently to the five-year sentence for inflicting corporal injury.

For fees and fines, the court ordered as follows: "We would set a restitution fine statutory minimum based on the restitution being paid to the actual victim in the case. So that will be $200, plus surcharges, and also the parole revocation fine will be stayed." The minute order, state prison commitment form, and abstract of judgment, however, specifically provide for: (1) a $200 restitution fine; (2) a $20 administrative surcharge on that fine; (3) an additional restitution fine of $200 suspended unless parole is revoked; (4) a $60 court security fee; and (5) a $90 court facilities assessment under Government Code section 70373.

DISCUSSION

I

The Felony False Imprisonment Instruction

Defendant contends the trial court prejudicially erred in instructing the jury on the charge of felony false imprisonment because the court failed to tell the jury "that the government [had to] prove that the restraint [was] by way of violence or menace." The People concede error but contend it was harmless. We agree there was error but cannot find it harmless beyond a reasonable doubt.

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which section 654 is applicable." (*People v. Miller* (1977) 18 Cal.3d 873, 886.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) "The offense becomes felonious when it is 'effected by violence, menace, fraud, or deceit . . . .'" (*People v. Reed* (2000) 78 Cal.App.4th 274, 280, quoting § 237.)

As we have noted, the trial court told the jury defendant was "charged . . . with false imprisonment by . . . violence or menace" and defined the terms "violence" and "menace" for the jury, but the court did not instruct the jury that the prosecution had to prove defendant restrained, confined, or detained the victim *by* violence or menace. As the People concede, this was error. "The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Here, the trial court did not fully and correctly instruct the jury on the "violence or menace" element of felony false imprisonment.

"It is appropriate and constitutionally permissible to analyze instructional error with regard to an element of an offense by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705 . . .]." (*People v. Brenner* (1992) 5 Cal.App.4th 335, 339.) "Such an error is reviewed to determine whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.)

Here, defendant asserts that "any properly instructed rational jury could easily have found that the elements of felony false imprisonment were not proven," that defendant did not restrain the victim "by violence or menace." Essentially, defendant contends the jury reasonably could have found that all he did to restrain the victim "consisted of blocking exits from the kitchen and hanging onto [her] legs while her brother was trying to pull her through the window." In his view, "the act of locking a door or blocking an exit might be expected in any crime of false imprisonment" and "holding onto someone's legs" would not "inevitably be found to be an act of violence." Thus, he contends, the omission in the jury instruction cannot be deemed harmless beyond a reasonable doubt.

The People assert that because "the court's omission was not total," in that the court told the jury the crime was "false imprisonment by . . . violence or menace" and defined the terms "violence" and "menace" for the jury, and because the prosecutor argued the element of "by violence or menace," "any reasonable, rational juror putting all of the instructions together along with the argument would have known of the obligation to determine whether [defendant]'s act of holding the victim against her will involved either violence or menace." The People further contend that "the jurors were presented with no

evidence that the crime [was] committed other than with violence."[6]

Although it is certainly possible, and perhaps even probable, that the jury understood from the court's instructions as a whole that defendant had to have restrained, confined, or detained the victim *by violence or menace* to be guilty of the felony charge of false imprisonment with which he was charged, we cannot say *beyond a reasonable doubt* that the jury had this understanding. If the jurors focused on the elements of the crime the trial court specifically instructed them the prosecution had to prove, all they had to find to convict defendant of felony false imprisonment was that he "intentionally restrained, confined, or detained" the victim and "made [her] stay or go somewhere against [her] will." True, the court told the jury defendant was charged with "false imprisonment by . . . violence or menace" and defined the terms "violence" and "menace" for the jury, but the court never instructed the jury that the prosecution had to prove -- either beyond a reasonable doubt or otherwise -- that defendant used violence or menace to restrain, confine, or detain the victim. In the absence of such an instruction, we cannot be assured beyond a reasonable doubt that the jury properly understood the crime of felony false imprisonment.

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[6] The People actually use the term "violence and menace," but nowhere do they actually argue there was evidence defendant restrained the victim by menace.

Moreover, we disagree with the People that there was no evidence the crime was committed except with violence. "'Violence . . . means the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.'" (*People v. Babich* (1993) 14 Cal.App.4th 801, 806, italics omitted.) In assessing the charges against defendant, the jury could have determined that the infliction of corporal injury occurred when he repeatedly beat the victim and the false imprisonment occurred when he tried to prevent her from escaping further beating, first by blocking and locking the doors, then by grabbing and pulling on her legs to prevent her from leaving through the kitchen window. While the jury might have found that the force defendant used to keep the victim from crawling out the window was "greater than the force reasonably necessary to . . . restrain" her, we cannot say *beyond a reasonable doubt* that the jurors necessarily made that finding or would have made that finding if they had been properly instructed on the elements of felony false imprisonment.

In the end, the People assert "it is not at all likely that any defect in the false imprisonment instructions worked to [defendant]'s detriment," but that is not the test. To affirm defendant's conviction of felony false imprisonment, we must be persuaded beyond a reasonable doubt that the erroneous jury instruction did not contribute to the verdict. We are not so persuaded. Accordingly, the trial court's error in instructing the jury on the charge of felony false imprisonment was

prejudicial, and we must reverse defendant's conviction on that charge.[7]

Before proceeding, we pause to note that perhaps this error (and the other instructional error defendant asserts below) could have been avoided if the trial court had shown an appropriate appreciation for the importance of jury instructions. Following the close of evidence, the trial court told the jurors it was going to "pre-instruct" them, before closing argument. The court then said, "The instructions are boring. So we, you know, it's my thought we would kind of get it over with. The more dynamic part of the -- the ending of this trial is coming from the attorneys." The court explained that the instructions were "not really that long," especially compared to a murder case the court once had where there were "an hour and forty-five minutes of instructions." The court then said, "They can get really -- I mean, it's bad for me to have to read it; it's bad for the jury to have to listen to them." Before sending the jury out on a break, the court said, "I'll go ahead and read them to you. I think it's easier to do it today, get it out of the way." The court also said, "At

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[7] Because the case has to be remanded for retrial on the felony false imprisonment charge, we do not address defendant's argument that his trial counsel was ineffective for failing to assure the jury was properly instructed on that charge and/or in failing to request an instruction on the lesser included charge of misdemeanor false imprisonment (i.e., false imprisonment *without* violence or menace).

least we will get that out of the way and then you can come back to the more fun part of the closing at least."

After the break, just before reading the instructions to the jury, the trial court apologized in advance that its "monotone" reading of the instructions would "come across as dry," and then said, "And it's probably a good time of the day, it will put you to sleep at this point. It is boring. But, again, this is a lot shorter than a lot of time when, as I say, a murder case I had lasted an hour and forty-five minutes. And that's really -- it's bad for everyone. [¶] So we'll get through this as quickly as possible and send you home for the day."

When the court finished reading the instructions, the court commented, "Made it. That's it." And this comment came only 13 lines of transcript after the court had said, "The term great bodily injury is defined elsewhere in these instructions. And we will refer you to that," which, as we have noted, never happened.

While there may have been no *error* in the trial court's comments on the instructions -- and certainly neither party has assigned any error to those comments -- we do not believe the administration of justice is facilitated by treating the reading of jury instructions as an unpleasant race, repeatedly telling the jury that the instructions are something "bad" and "boring" to have to listen to and something to "get . . . over with" and "get . . . out of the way."

In *People v. Pinholster* (1992) 1 Cal.4th 865 -- a death penalty case -- the trial court offered a somewhat similar, albeit much more limited, comment when it told the jury that the reading of instructions was "not one of the real interesting and exciting ways to spend a morning." (*Id.* at p. 952.) At least in *Pinholster*, however, the trial court immediately followed its comment with the qualification, "but it is of utmost importance." (*Id.* at pp. 952-953.) The trial court here did no such thing.

We offer these observations primarily to suggest that if the trial court had not been so fixated on how "boring" it is to have to read (and listen to) jury instructions, and had not been in such a hurry to "get [them] over with" and "get [them] out of the way," perhaps the court would have noticed the omissions in the instructions defendant has raised on appeal, and perhaps the court could have forestalled much of this appeal -- and certainly the reversal we now have to order -- by correcting those omissions. Unfortunately, that did not happen. Perhaps next time it will.

II

The Great Bodily Injury Enhancements

Defendant first contends there was insufficient evidence that he inflicted great bodily injury during the commission of the false imprisonment.[8] We agree.

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[8] We consider this argument, despite our reversal of the false imprisonment conviction for instructional error, because

Section 12022.7, subdivision (e) provides that "[a]ny person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." As used in this statute, "'great bodily injury' means a significant or substantial physical injury." (§ 12022.7, subd. (f).)

Defendant concedes "there is little doubt that [the victim] received a significant and substantial injury as a result of the domestic assault," but "[t]he same may not be said in regard to the crime of false imprisonment." According to defendant, "the prosecutor conceded that the only injury [the victim] received . . . during the false imprisonment was a bruise on her leg," and "[t]he medical expert who subsequently examined her made no mention of any bruise on her leg."

The People offer a twofold response. First, they contend that "in light of the defense argument [at sentencing] that the assault and false imprisonment were so closely connected . . . that separate punishment for both was precluded under Penal Code section 654, [defendant] should be foreclosed on appeal from arguing the separate nature of both crimes generally and specifically the separate nature of the violence used to

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if the evidence of the enhancement allegation was insufficient, the People are barred by double jeopardy principles from retrying that allegation on remand. (See *People v. Seel* (2004) 34 Cal.4th 535.)

accomplish each crime." Second, they contend "there was more than enough injury to support [the] enhancements" on both charges.

We are not persuaded by either of the People's arguments. It is true defendant convinced the trial court to stay separate punishment on the false imprisonment charge under section 654, but this means only that the trial court concluded the two crimes -- the beating and the subsequent attempt to prevent the victim from escaping -- constituted a single "act" -- i.e., "a 'course of conduct' or series of acts [that] compris[ed] an indivisible transaction" -- for purposes of *sentencing* under section 654. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.) It does *not* mean the two crimes cannot (or should not) be separately analyzed in determining whether there was sufficient evidence to support the finding that defendant personally inflicted great bodily injury in the commission of each offense. Indeed, the People offer no authority for their argument to the contrary.

As for whether "there was more than enough injury to support [the] enhancements" on both charges," the People suggest a finding that defendant inflicted great bodily injury in committing the false imprisonment could have been premised on several factors. First, they contend defendant's efforts to keep the victim inside, while her brother was trying to pull her outside, involved "pressure [that] intensif[ied] the bruising the victim had already suffered at [defendant's] hands." On this point, however, they do not cite any *evidence* that the

victim's bruises were worse because of the tug-of-war at the kitchen window.

Second, the People assert that "the fact the victim was undergoing this violent tugging while her whole body hurt . . . could hardly be dismissed as insignificant." The question, however, is not whether the victim suffered significant *pain* while defendant was falsely imprisoning her, but whether she suffered significant *injury* while he was doing so. Only if there was evidence the pain the victim suffered while defendant was pulling on her legs was due to significant injury being inflicted on her *at that time* would the evidence of her pain support the enhancement on the false imprisonment charge. But the People do not point to any such evidence.

Finally, the People argue that evidence a responding sheriff's deputy "noticed blood in several areas of the house as well as outside the window on the concrete . . . indicated how [defendant]'s tugging actions exacerbated the victim's blood loss." This argument fails for two reasons. First, evidence of the presence of blood, without more, does not show that the tug-of-war at the window "exacerbated the victim's blood loss." Second, even if it could be said that by pulling on the victim's legs defendant "exacerbated [her] blood loss" from the injuries he inflicted on her during the earlier beating, that would not provide a substantial evidentiary basis for finding that defendant inflicted significant or substantial physical injury on the victim during the commission of the false imprisonment. The People offer no authority for the suggestion that

exacerbating the blood loss from a previous injury constitutes a new and separate injury, let alone a new and separate injury that may be deemed significant or substantial.

In summary, we agree with defendant that there was insufficient evidence to support the great bodily injury enhancement on the false imprisonment charge.[9] Accordingly, on remand, retrial of that enhancement allegation is prohibited.

III

Admission Of Prior Acts Of Domestic Violence

Defendant contends the admission of evidence of his prior acts of domestic violence under Evidence Code section 1109 violated his rights to due process of law under the state and federal Constitutions. He acknowledges that in *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court rejected a similar challenge to Evidence Code section 1108, a parallel provision involving evidence of prior sexual offenses. He also acknowledges that numerous Courts of Appeal, including this one, have upheld Evidence Code section 1109 against the

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[9] Because of this conclusion, we need not address defendant's argument that the trial court committed reversible error in failing to instruct the jury on the meaning of "great bodily injury" or his argument that his trial attorney was ineffective in failing to prevent this error. This is so, even though there was also a great bodily injury enhancement on the inflicting corporal injury charge, because the only prejudice defendant claims from this error relates to the false imprisonment charge. In effect, he concedes that any error in the great bodily injury instruction was harmless as it pertains to the inflicting corporal injury charge because "there is little doubt that [the victim] received a substantial or significant injury as a result of the domestic assault."

constitutional challenge he raises based on the reasoning in *Falsetta*. (See, e.g., *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-421.) Defendant argues, however, that "the appellate decisions have failed to recognize the fundamental distinctions that undermine the reliance on *Falsetta*."

Defendant first asserts that "section 1108 was drafted to track changes in the Federal Rules of Evidence," but "[t]here is no similar federal provision supporting the extension of propensity evidence . . . to cases of domestic violence." This fact has no bearing, however, on whether the reasoning in *Falsetta* with respect to Evidence Code section 1108 applies with equal force to Evidence Code section 1109. While the Supreme Court in *Falsetta* did note that Evidence Code "[s]ection 1108 was modeled on rule 413 of the Federal Rules of Evidence" (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 912), that observation played no part in the court's *reasoning* that Evidence Code section 1108 did not violate due process.

Defendant next asserts that the Supreme Court in *Falsetta* "placed particular emphasis on the unique nature of sexual offenders and their crimes, thus enhancing the probative value of prior offenses," but "nothing suggests that the domestic assailant is so unique among defendants that evidence of prior acts is particularly probative." We disagree. As this court explained in *Johnson*, "the Legislature determined the need for [propensity] evidence was critical in sex offense cases, given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial. (*People v. Falsetta*,

supra, 21 Cal.4th at pp. 911-912, 914.) The Legislature declared the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining witness credibility. (*Ibid.*) The commission of other sex offenses is at least circumstantially relevant to the issue of disposition or propensity to commit these offenses. (*Ibid.*) Such evidence is deemed objectionable not because it lacks probative value, but because it has too much." (*People v. Johnson*, *supra*, 77 Cal.App.4th at p. 418.) As this court also explained in *Johnson*, "[t]he same reasoning applies to prior acts of domestic violence under Evidence Code section 1109. Thus, the legislative history of the statute recognizes the special nature of domestic violence crime, as follows: 'The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to

look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.' (Assem. Com. Rep. on Public Safety (June 25, 1996) pp. 3-4.)" (*Johnson*, at p. 419.) Thus, special considerations unique to domestic violence crimes justify allowing propensity evidence relating to those crimes just as special considerations unique to sexual offenses justify allowing propensity evidence relating to those offenses.

Finally, defendant asserts that the Supreme Court's decision in *Falsetta* was based, at least in part, on "the historical judicial ambiguity in regard to the admission of prior sex crimes in sexual offender cases," but "no such ambiguity has ever been cited" "[i]n regard to domestic violence cases." This argument is based on a misreading of *Falsetta*. It is true the Supreme Court found it "unclear whether the rule against 'propensity' evidence in *sex offense cases* should be deemed a fundamental historical principle of justice." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 914.) However, the court immediately proceeded to observe that "even if the rule were deemed fundamental from a historical perspective, we would nonetheless uphold [Evidence Code] section 1108 if it did not unduly 'offend' those fundamental due process principles," and "[a]s will appear, in light of the substantial protections afforded to defendants in all cases to which [Evidence Code] section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence." (*Falsetta*, at p. 915.) Thus, the "historical judicial

ambiguity" defendant finds so significant in fact had no bearing on the Supreme Court's decision.

As defendant has failed to identify any "fundamental distinctions that undermine the reliance on *Falsetta*," we continue to adhere to our decision in *Johnson* that because "the parallel provision . . . which allows admission of prior sex offenses, does not violate due process," "by parity of reasoning, the same applies to Evidence Code section 1109, since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence." (*People v. Johnson*, *supra*, 77 Cal.App.4th at p. 417.)

IV

Fines And Fees

Defendant first contends the "additional fees and fines . . . set forth in the clerk's minute order" but "never orally pronounced by the court" must be stricken. The People assert that "the surcharge on the restitution fine as well as the court security fee and [court facilities] assessment were all mandatory and as such, should be upheld, despite any error in the court's pronouncement." As for the administrative surcharge on the restitution fine, the People argue that if that surcharge was not mandatory, "remand would be the appropriate remedy."

"The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) That rule was contravened here. All

the court pronounced was a $200 restitution fine "plus surcharges," but the minute order, state prison commitment form, and abstract of judgment all detailed various specific fines and fees other than the restitution fine.

Usually, the proper remedy in such a case is to order the documents modified to accurately reflect what occurred at the sentencing hearing. (*People v. Zackery*, *supra*, 147 Cal.App.4th. at pp. 388, 393.) Here, however, since we must reverse and remand for retrial on the false imprisonment charge, that reversal necessarily sets the fines and fees at large again. We presume that on remand, when the trial court resentences defendant, the court will properly pronounce, on the record, all appropriate fines and fees it is imposing.

Defendant next contends it was constitutional error for the trial court to impose a $90 court facilities assessment because Government Code section 70373 -- which imposes a $30 assessment for each misdemeanor or felony -- became effective after December 2008, when he shot the firearm in the house, and therefore the $30 of the $90 fee that corresponds to the charge of grossly negligent discharge of a firearm must be stricken. We recently rejected a similar ex post facto challenge to the court facilities assessment in *People v. Fleury* (2010) 182 Cal.App.4th 1486, and we do so again here. Application of the court facilities assessment to a crime committed before the enactment of Government Code section 70373 does not violate the ex post facto clause of the state or federal Constitution for the reasons set forth in *Fleury*.

DISPOSITION

The convictions for inflicting corporal injury (with its accompanying great bodily injury enhancement) and grossly negligent discharge of a firearm are affirmed, but otherwise the judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.